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No. 93-1250

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

LYLE S. CHANDLER, ADOLPHUS A. MADDOX,
and Others Similarly Situated,
Petitioners,

VS.

THE CITY OF DALLAS,
Respondent.

ADVOCACY, INCORPORATED, ASSOCIATION FOR EDUCATION AND REHABILITATION OF THE BLIND AND VISUALLY IMPAIRED, BAZELON CENTER FOR MENTAL HEALTH LAW, DISABILITY RIGHTS COUNCIL, EPILEPSY FOUNDATION OF AMERICA, NATIONAL ALLIANCE FOR MENTALLY ILL, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AND PARALYZED VETERANS OF AMERICA

MOTION TO FILE BRIEF AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE ADVOCACY, INCORPORATED ET AL. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Amici, Advocacy, Incorporated, et. al. are organizations which serve and represent people with disabilities who have a direct interest in the issues involved in this case. Pursuant to Rule 37.4 Amici respectfully move this Court for an Order granting leave to file the attached amicus curiae brief in support of the petition for writ of certiorari which provides further analysis of the two key concepts in disability rights laws, "individual with a disability," and "qualified individual with a disability" and which addresses the impact of the Fifth Circuit's denial of class actions in this type of case. Consent of attorneys for Petitioners has been obtained. Consent of attorneys for Respondent has been refused.

INTEREST OF AMICI

Amici Advocacy, Incorporated et al. are national and state service, advocacy, and professional organizations that serve citizens with a variety of disabilities. All of the disabilities represented share a common history of enduring prejudice, fear, stigma, myth, animus, and recalcitrant stereotypes that affect persons with disabilities in all aspects of life, especially employment. Each Amici draws upon a wealth of direct and practical experience with the types of blanket exclusion involved in this case. Amici have seen the waste of human potential, the economic consequences to people with disabilities and their families and the devastating assault to dignity that result from denying people who are able to work the opportunity to do so.

Amici know that the Fifth Circuit's decision threatens the principle of full inclusion of persons with disabilities and the protections afforded by Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act. Amici lament the irony created by the Fifth Circuit's decision, that the advancements in medical treatment that would allow people to become more integrated into the mainstream of society, would actually result in stripping them of the civil rights protections of the law. Amici exhort the Court to recognize that blanket exclusions from employment based not on reasoned medical judgment, but on stereotypes, myths and fear, and the denial of class action remedies, would strike a punishing blow to the forty-three million people with disabilities whom Congress sought to protect. Amici, therefore submit the following brief in support of petitioner.

National and State Membership, Service and Advocacy Organizations

Amicus Advocacy, Incorporated, a non-profit legal advocacy group created and funded by the State of Texas pursuant to federal mandate, provides both statewide education and legal advocacy on behalf of persons with mental and physical disabilities.

Amicus Association for Education and Rehabilitation of the Blind and Visually Impaired, comprised of roughly 5,000 members throughout the United States and Canada, is the only international membership organization composed primarily of professionals who work with blind and visually impaired children and adults.

Amicus Bazelon Center for Mental Health Law, formerly the Mental Health Law Project, is a privately-funded, public interest

law firm dedicated to advocating for the rights of adults and children with mental disabilities, through litigation, administrative advocacy, education and technical assistance.

Amicus Disability Rights Council of Greater Washington, represented by the Washington Lawyers Committee for Civil Rights and Urban Affairs and leading Washington law firms on a pro bono basis, was organized by Washington, D.C. attorneys dedicated to enforcing the Americans with Disability Act and related laws on behalf of persons with disabilities and has actively worked against employment discrimination.

Amicus Epilepsy Foundation of America is a non-profit corporation founded in 1968 which advances the interests of over two million Americans with epilepsy through research, employment programs, public information and education, professional awareness, and advocacy.

Amicus National Alliance For Mentally Ill, with over one thousand local affiliates and 140,000 members, is a national grass roots organization which advocates for the rights of persons with mental illness to equal access in employment, housing, and other aspects of community life.

Amicus National Association of Protection and Advocacy Systems provides technical assistance and training in disability rights law, and it acts as a liaison between the nationwide protection and advocacy systems authorized under federal statutes and the federal executive and legislative branches.

Amicus National Employment Lawyers Association, comprised of 1,700 members who regularly handle cases of discrimination, represents a large segment of the leaders of the bar that specialize in employment discrimination law.

Amicus Paralyzed Veterans of America is a Congressionally created Veterans Service Organization, with roughly 15,000 members with disabilities resulting from injury or disease of the spinal cord, and advocates for the full enforcement of all laws affecting people with disabilities.

Respectfully submitted,

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Dated: March 1, 1994

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i-v
INTRODUCTION/SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. THE FIFTH CIRCUIT'S HOLDING THAT PETITIONERS WERE NOT "REGARDED AS" HANDICAPPED WITHIN THE MEANING OF SECTION 504 IS CONTRARY TO DECISIONS OF THIS COURT, OTHER CIRCUIT COURTS AND FEDERAL REGULATIONS AND FRUSTRATES CONGRESSIONAL INTENT	4
II. THE FIFTH CIRCUIT'S FAILURE TO CONDUCT AN INDIVIDUALIZED INQUIRY INTO THE ABILITY OF PETITIONERS TO DO THEIR JOBS, INCLUDING DRIVING, IS CONTRARY TO DECISIONS OF THIS COURT, OTHER CIRCUIT COURTS AND CONGRESSIONAL INTENT	9
III. THE FIFTH CIRCUIT'S CATEGORICAL DENIAL OF CLASS TREATMENT IN SECTION 504 CASES IS INCONSISTENT WITH THE REHABILITATION ACT AND THE DECISIONS OF THIS COURT	14
CONCLUSION	19

TABLE OF AUTHORITIES

Cases

Page

Andre H. v. Ambach, 104 F.R.D. 606 (SDNY 1985) 17
Alexander v. Choate, 469 U.S. 287 (1985) 16
American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) 18
Bentivegna v. U.S. Department of Labor, 694 F.2d 619 (9th Cir. 1982) 11
Chalk v. U.S. District Court for the Central District of California, 840 F.2d 701 (9th Cir. 1988) 12
Chandler v. City of Dallas, 958 F.2d 85 (5th Cir. 1992) .. 16
Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993), reh'g den'd, 9 F.3d 105 (1993) 1, 4, 15
Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) 2, 3, 9, 15
Cook v. State of Rhode Island, 10 F.3d 17,(1st Cir. 1993) 6, 10
Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984) ... 17, 18
Doe v. Attorney General of the United States, 941 F.2d 780 (9th Cir. 1991) 12
Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1989) 10
E.E. Black v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980) 7
Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986) 6, 7
General Telephone Co. v. Falcon, 457 U.S. 147 (1982) ... 14
Griggs v. Duke Power Company, 401 U.S. 424 (1971) ... 12, 16
Guardians Ass'n v. Civil Service Com'n of City of New York, 463 U.S. 582 (1983) 15
Hall v. United States Postal Service, 857 F.2d 1073 (6th Cir. 1988) 10
Hills v. Gautreaux, 425 U.S. 284 (1976) 15
Jasany v. U.S. Postal Service, 755 F.2d 1244 (6th Cir. 1985) 6, 7
Jefferson v. Hackney, 406 U.S. 535 (1972) 15

Table of Authorities

Cases—Continued

Page

Jenkins v. Raymark Industries, Inc., 782 F.2d 468 (5th Cir. 1986) 18

Johnson v. Mayor and City Council of Baltimore, 472 U.S. 353 (1985) 3, 13

Jose P. v. Ambach, 669 F.2d 865 (2d Cir. 1982) 16

Kohl by Kohl v. Woodhaven Learning Center, 865 F.2d 930 (8th Cir. 1989) 10

Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) 12

Martinez v. School Board of Hillsborough County, 861 F.2d 1502 (11th Cir. 1988) 10

New Mexico Association of Retarded Citizens v. State of New Mexico, 678 F.2d 847 (10th Cir. 1982) 16

New York State Association of Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979) 10, 16

Pandazides v. Virginia Board of Education, 946 F.2d 345 (4th Cir. 1991) 10

Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987) 6

Roncker v. Walter, 700 F.2d 1058 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983) 16, 17

School Board of Nassau County v. Arline, 480 U.S. 273 (1986) .....*passim*

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 4, 11

Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983) 10, 11, 16

Taylor v. U.S. Postal Service, 946 F.2d 1214 (6th Cir. 1991) 6

Thornhill v. Marsh, 866 F.2d 1182 (9th Cir. 1989) 6

Woods v. Omaha School District, 985 F.2d 437 (8th Cir. 1993) 13

Yaris v. Special School District of St. Louis County, 780 F.2d 724 (8th Cir 1986) 16

Table of Authorities

Statutes, Regulations and Rules

Page

29 U.S.C. § 701 et seq. (Rehabilitation Act) 13, 4
42 U.S.C. § 12101 et seq. (Americans with Disabilities Act) 2
42 U.S.C. § 12134 2
49 App U.S.C.A. § 2503 12
49 App. U.S.C.A. § 2505 13
29 C.F.R. § 1630 (1993) 4, 5, 9
29 C.F.R. § 32 (1993) 12
45 C.F.R. § 84 (1985) 4
49 C.F.R. § 390 (1992) 12
55 Fed. Reg. 4102 (1990) 14
57 Fed. Reg. 10295 (1992) 13
58 Fed. Reg. 40690 (1993) 13
58 Fed. Reg. 40693 (1993) 13
Fed. R. Civ. P. 23(b)(2) 15, 16

Legislative History

S. Rep. No. 424, 98th Congress (1984) 3, 13
S. Rep. No. 1297, 93rd Congress (1974) 4
H. Rep. No. 485 (III), 101st Congress, 2nd Session (1990) 5, 9

Books and Publications

Federal Highway Administration, *Monitoring Drivers of Commercial Motor Vehicles Who Receive Vision Waivers*, December 9, 1993 14

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BRIEF OF AMICUS CURIAE ADVOCACY, INCORPORATED ET AL. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION/SUMMARY OF THE ARGUMENT

In this case, *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), the Fifth Circuit violated the central principle of federal disability civil rights legislation — that individuals must be judged on merit, not disability status.[1] Contrary to Congressional intent

[1] While this case involves Section 504 of the 1973 Rehabilitation Act, 29 U.S.C. § 794, the issues are identical under the recently enacted Americans with Disabilities Act ("ADA") which incorporates the

that the definition of "individual with a disability" be broad,[2] the Fifth Circuit refused to confer coverage to individuals who were excluded from over 4,000 city jobs in 138 categories solely because of their physical impairments. At the same time, the court held that, even if they were covered, their impairments render them so unsafe as to make them unqualified, as a matter of law. The court reached this conclusion without considering any information about the individuals involved and in total disregard of the detailed findings of fact by the district court. By holding that petitioners are not disabled enough to be protected by Section 504 and yet are so disabled as to be per se unqualified, the court created an untenable legal standard that eviscerates the Act for millions of Americans whom Congress sought to protect. Further, by refusing to recognize class action relief in cases under Section 504, the Fifth Circuit defeated Congress' express intent that individuals aggrieved by disability discrimination have the same remedies as other civil rights claimants.[3]

The Fifth Circuit's restrictive interpretation of the definition of disability defeats Congress' intention that individuals like petitioners have the opportunity to challenge adverse decisions which are based on their physical impairments. There is perhaps no stereotype about people with disabilities that is more pervasive and more harmful than the assumption that people with disabilities present safety risks. In order to ensure that decisions are not based on stereotypes, Section 504 "is carefully structured to replace reflexive reactions to actual or perceived handicaps with actions based on reasoned, sound medical judgments. . . ."[4] To prevent employers from unjustifiably excluding people with disabilities from the workforce, this Court required an individualized

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Section 504 definitions involved in this case. In fact, Title II of the ADA, which covers state and local government entities, like Dallas, simply incorporates the rights, remedies and procedures of Section 504, 42 U.S.C. § 12132, and mandates that regulations promulgated to implement Title II be consistent with the Section 504 regulations. 42 U.S.C. § 12134(b).

[2] *Nassau County School Bd. v. Arline*, 480 U.S. 273, 285 (1987).

[3] *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 625 (1984), citing 29 U.S.C. § 794a(a)(2).

[4] *Arline*, 480 U.S. at 285.

bilities from the workforce, this Court required an individualized inquiry into the physical capabilities and safety risks posed by the person seeking the Act's protection.[5]

Far from the individualized inquiry required by *Arline*, the Fifth Circuit upheld the City's use of blanket exclusions developed by the U.S. Department of Transportation (DOT) for entirely different purposes. As this Court admonished in *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353 (1985), a federal regulation cannot be adopted and used to defend a claim of discrimination unless there is a congruity of purpose which justifies the application of the federal standard. Neither the City in adopting, nor the Fifth Circuit in upholding the exclusionary criteria even attempted to show a reasoned or medically sound justification for the application of federal standards designed for interstate driving of commercial vehicles to city driving of non-commercial vehicles. Nor would it have been possible to show a congruity of purpose given that Congress' intent not to extend the standards to the type of driving involved in this case was express.[6]

By upholding a blanket exclusion based on disability under the rubric of safety without requiring any substantiation of the standards used and without regard to the proven track record of the petitioners, the Fifth Circuit has left millions of disabled Americans vulnerable to exactly the type of discrimination Congress sought to prevent in enacting Section 504 and the Americans with Disabilities Act. Petitioners, and all those with excluded disabilities, carry a stigma of dangerousness and hazardousness and are foreclosed from the job opportunities Congress sought to promote.[7]

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[5] *Id.* at 287.

[6] S. Rep. No. 424, 98th Congress (1984). Department of Transportation regulations and their proper application are discussed, *infra*. Because this case implicates the Section 504, ADA and Department of Transportation regulations, amici request that the Court ask the Government for its views.

[7] As this Court stated in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634, the remedial purpose of the Rehabilitation Act is to "promote and expand employment opportunities" for the handicapped. 29 U.S.C. § 701(8).

ARGUMENT

I. THE FIFTH CIRCUIT'S HOLDING THAT PETITIONERS WERE NOT "REGARDED AS" HANDICAPPED WITHIN THE MEANING OF SECTION 504 IS CONTRARY TO DECISIONS OF THIS COURT, OTHER CIRCUIT COURTS AND FEDERAL REGULATIONS AND FRUSTRATES CONGRESSIONAL INTENT.[8]

In *Arline, supra*, this Court stated that in order "[t]o combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of 'handicapped individual' so as to preclude discrimination against '[a] person who has a record of, or is regarded as having an impairment [but who] may at present have no actual incapacity at all.' "[9] Congress recognized that individuals with physical impairments that are not substantially limiting and therefore may not fall under the first prong of the definition are subjected to discrimination.[10] Thus, the Court concluded that Congress added the "regarded as" prong to the definition of "handicapped individual" because "society's accumulated myths and fears about disa-

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[8] Amici agree with petitioner that Chandler should have been covered under the first prong of the "handicap" definition — substantially limited in a major life activity. 29 U.S.C. § 706(7)(B). *See* Petitioners' Brief, p.18. The Fifth Circuit mistakenly stated that the Dept. of Health and Human Services (formerly HEW) regulations do not expressly discuss diabetes. *Chandler*, 2 F.3d at 1391. However, as this Court noted in *Arline*, HEW did give examples of disabilities that would be covered, including diabetes. *Arline*, 480 US. at 280 n.5, citing 45 C.F.R. 84, Appendix A, p. 310 (1985).

Moreover, the Fifth Circuit's refusal to accept the regulations of the EEOC implementing the Americans with Disabilities Act which state that diabetes requiring insulin for control is covered by the first prong of the definition of disability is particularly inappropriate given that in the ADA, "Congress adopted the definition of [disability] from the Rehabilitation Act." 29 C.F.R § 1630.2(g), App. 402.

[9] *Arline*, 480 U.S. at 279, citing *Southeastern Community College v. Davis*, 442 U.S. 397, 405-406, n. 6 (1979).

[10] *Id.*, citing S. Rep. No. 1297, p. 39, 93rd Congress (1974).

bility and disease are as handicapping as are the physical limitations that flow from actual impairment."[11]

The Court's warning is particularly pertinent in this case because diabetes and impaired vision have historically been considered hazardous disabilities. In this case, the City of Dallas engaged in precisely the sort of discriminatory conduct that Congress sought to prevent when it amended Section 504. The City regarded the petitioners as disabled by concluding that they had impairments which were substantial enough to prevent them from driving safely. More generally, the City's characterization of petitioners as unable to drive implicates their ability to perform a wide myriad of jobs where safety is an issue. The City's perception of Chandler and Maddox as being "unsafe" because of their impairments is exactly the type of myth, fear and stereotype which has limited the opportunities of people with disabilities historically.[12] It is because of the discrimination that results from these fears that Congress expanded the definition of "handicapped individual" to cover the type of situation presented here.[13]

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[11] *Id.* at 284.

[12] The EEOC, the agency charged with implementing the employment provisions of the ADA, has honed in on the "substantially limited in working" part of the definition of individual with a disability. Following language in the Judiciary Report, H. Rep. No. 485 part 3, 101st Cong., 2nd Session, 30-31 (1990), the EEOC Commentary to its regulations provides that:

> An individual rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities would be covered under this part of the definition of disability [regarded as], whether or not the employer's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding . . . safety . . . 29 C.F.R. § 1630, App. 406 (1993).

[13] *Arline*, 480 U.S. at 284. (Basic to purpose of Section 504 is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others.)

The Fifth Circuit's restrictive interpretation of the "regarded as" prong of the definition also cannot be reconciled with decisions rendered by other appellate courts,[14] including the appellate decisions which it cites as supporting authority. The Fifth Circuit ruled that in order to establish that an employer perceived them as handicapped the plaintiffs were required to show that they were considered incapable of performing work related functions in general.

As support for this proposition, the Fifth Circuit cited *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986), and *Jasany v. U.S. Postal Service*, 755 F.2d 1244 (6th Cir. 1985). Neither case would condone the sweeping holding of the Fifth Circuit in this case. In *Forrisi*, the Fourth Circuit rejected coverage for the plaintiff who had acrophobia and was unable to climb ladders or stairs to certain heights because "[f]ar from being regarded as having a "substantial limitation in employability, [the plaintiff] was seen as unsuited for one position in one plant — and nothing more."[15]

In *Jasany* the Sixth Circuit ruled that a postal worker with a mild case of strabismus (crossed eyes) was not "handicapped" because his condition did not affect him in any way other than the ability to operate a particular mail sorting machine. The court did not even address the third prong of the definition — regarded as having a handicap. Moreover, in the Sixth Circuit's more recent decision in *Taylor v. U.S. Postal Service*, 946 F.2d 1214, 1218

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[14] *See, Taylor v. U.S. Postal Service*, 946 F.2d 1214 (6th Cir. 1991) (a person with a degenerative bone condition in his back and knees was perceived as handicapped because the Post Office believed that he was incapable of safely performing the job of distribution clerk); *Cook v. State of Rhode Island*, 10 F.3d 17, (1st Cir. 1993) (it is not necessary for an employee to show that her impairment would prevent her from doing a broad range or number of jobs); *Thornhill v. Marsh*, 866 F.2d 1182 (9th Cir. 1989) (the Army Corps of Engineers refused to hire the plaintiff because X-rays revealed a congenital spinal deformity, despite the fact that the Corps' doctors concluded that this deformity would not limit the plaintiff's ability to lift weights). *See also, Reynolds v. Brock*, 815 F.2d 571, 573 (9th Cir. 1987) (a plaintiff need not prove that she is incapable of doing her job to prove that she is "handicapped.")

[15] *Forrisi*, 794 F.2d at 935.

(6th Cir. 1991), the court emphasized the Supreme Court's admonition in *Arline* that the Act's definition of handicap is broad.

In *Chandler*, the Fifth Circuit held that the City of Dallas did not regard the petitioners as handicapped even though its exclusionary rule barred them from performing *138* different job classifications involving approximately *4,000* job positions.[16] Petitioners were not barred from a single job, or a narrow range of jobs, as were the plaintiffs in *Forrisi* and *Jasany*.[17] The Fifth Circuit has expanded the rule contained in *Forrisi* and *Jasany* so far as to posit a new, and completely different, proposition, i.e., that as long as an employer regards an employee as incapable of performing a single job task, the employer may exclude the employee from a massive range of job types and job positions without challenge because those affected do not qualify for coverage under the regarded as prong of Section 504.[18]

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[16] Petitioners' Appendix B, p. 64a.

[17] Moreover, in *Forrisi* and *Jasany*, the impairments did actually affect job performance. Rather than perceiving the plaintiffs as "handicapped," the employer found that the impairments prevented performance of job-functions. In this case, the employer's standards did not relate to the ability to do the job. Petitioners were excluded for the sole reason that they have impairments, the classic case for Section 504 "regarded as" coverage.

[18] Moreover, in both *Forrisi* and *Jasany*, the courts relied on *E.E. Black v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980), which the Sixth Circuit described as the most comprehensive examination of the "substantially limited in working" issue. *Jasany*, 755 F.2d at 1248. In that case, the court emphasized that the exclusionary policy of defendant employer must be ascribed to all employers offering the same or similar jobs when evaluating whether the policy has a substantial impact on employment. Without this presumption of general usage, an employer would be rewarded for coming up with stringent and esoteric exclusionary criteria.

Employing the presumption in this case, it is clear that the exclusionary policy would have a profound effect on Petitioners' job opportunities. If all employers assumed that Petitioners were incapable of holding jobs which involved driving because of their impairments, Petitioners would be significantly curtailed in employment. If all employers assumed that Petitioners' disabilities rendered them unsafe generally, the limitation on employment opportunities would be even more dramatic.

Finally, it is important to understand that the Fifth Circuit's decision in *Chandler* is internally inconsistent, creating a never-ending Catch-22 for individuals such as petitioners whose impairments do not interfere with their jobs but who are discriminated against none the less. By endorsing the City's exclusion of petitioners because of the perception that their disabilities were so severe that they were not able to do their jobs safely, and at the same time concluding that petitioners were not disabled, the Fifth Circuit has taken inherently contradictory positions. In essence, the Fifth Circuit claims that petitioners were too disabled to do their jobs, yet were not disabled enough to be covered as people with disabilities under Section 504. This position simply does not make sense. The dangers of adopting this position are made clear by this case. In this case, the City of Dallas referred to the petitioners as disabled in order to satisfy federal affirmative action requirements,[19] excluded the petitioners from employment opportunities because of their impairments, and then subsequently argued in court that petitioners were not disabled within the meaning of Section 504. By refusing to find that petitioners were "regarded as" handicapped under these circumstances, the Fifth Circuit has undermined the central purpose of Section 504, as described in *Arline*:

> Such exclusion [from coverage] would mean that those accused of being [unsafe] would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they are 'otherwise qualified.' Rather they would be vulnerable to discrimination on the basis of mythology — precisely the type of injury Congress sought to prevent.[20]

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[19] Petitioners' Appendix B, p. 32a.

[20] *Arline*, 480 U.S. at 285.

II. THE FIFTH CIRCUIT'S FAILURE TO CONDUCT AN INDIVIDUALIZED INQUIRY INTO THE ABILITY OF PETITIONERS TO DO THEIR JOBS, INCLUDING DRIVING, IS CONTRARY TO DECISIONS OF THIS COURT, OTHER CIRCUIT COURTS AND CONGRESSIONAL INTENT.

The Supreme Court has stated that the primary purpose of Section 504 of the Rehabilitation Act of 1973 was to increase employment opportunities for people with disabilities.[21] To ensure that people with disabilities are not excluded from employment because of misconceptions or stereotypes about disability, this Court has required that employers act on the basis of accurate information about a individual's physical or mental abilities, rather than on the basis of uninformed generalizations as in this case.

As the Court wrote in *Arline*, "[t]he Act is carefully structured to replace [ ] reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments . . . ."[22] This Court reasoned that "[an individualized inquiry] is essential if Section 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."[23]

In this case, the Fifth Circuit has upheld precisely the type of conduct that this Court condemned in *Arline*. In *Arline*, this Court required an individualized inquiry into the safety risks posed by the classroom presence of a woman with record of tuberculosis. If the Fifth Circuit's decision were correct, the defendant in *Arline* could have avoided performing an individualized inquiry merely by adopting a blanket rule that *no* person with

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[21] *Consolidated Rail Corp. v. Darrone*, 465 U.S. at 634.

[22] *Arline*, 480 U.S. at 285. Decisions must be based on reasonable medical judgments about the nature of the safety risk, the duration of the risk, the severity of the risk and the probability that the injury will occur. *Id.* at 288; 29 C.F.R. § 1630, App. 406, 410 (1993); *see also* H. Rep. No. 485, part 3, 101 Congress 2nd Sess. at 34 (1990).

[23] *Arline*, 480 U.S. at 287.

tuberculosis or a history of tuberculosis could teach in the classroom because there was some unquantifiable safety risk associated with the impairment. The Fifth Circuit's decision would allow employers to exclude people with disabilities on the basis of an employer's assertion that an individual's disability posed a safety risk, no matter how closely the rule fit the physical qualifications necessary to perform the essential functions of the job, and no matter what the actual physical abilities of the individual in question.[24]

The Fifth Circuit's refusal to conduct an individualized inquiry into the risks posed by a particular person with a disability is also in direct conflict with decisions rendered by other appellate courts.[25] *Strathie v. Department of Transportation,* 716 F.2d 227

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[24] Because the Fifth Circuit held that petitioners were not qualified as a matter of law, it disregarded the individualized inquiry conducted by the trial court. It is ironic that at the time of trial and appeal, both plaintiffs *were* driving in their jobs for the City of Dallas. Moreover, a waiver process had already been established to the diabetes standard and Chandler had already qualified for the waiver because he posed "no increased risk." Petitioners' Appendix B, p. 44a.

[25] In addition to the Circuit Court opinions discussed in the text, *See Hall v. United States Postal Service,* 857 F.2d 1073, 1079 (6th Cir. 1988) (requiring individualized inquiry into risks posed by plaintiff who was unable to lift heavy weights without risk to her own health); *Doherty v. Southern College of Optometry,* 862 F.2d 570, 574 (6th Cir. 1989) (determination of whether plaintiff is otherwise qualified must be decided as an issue of fact); *Martinez v. School Board of Hillsborough County,* 861 F.2d 1502, 1505 (11th Cir. 1988) (Section 504 required an individualized assessment of the risks posed by child with AIDS in classroom); *Kohl by Kohl v. Woodhaven Learning Center,* 865 F.2d 930, 936 (8th Cir. 1989) (individualized inquiry required before excluding a child with hepatitis B from a rehabilitation residence); *New York State Association of Retarded Children v. Carey,* 612 F.2d 644, 650 (2d Cir. 1979) (segregation of carriers of hepatitis B in the New York schools violated Section 504, based on detailed inquiry into the risks posed by children who were carriers). *See also, Pandazides v. Virginia Board of Education,* 946 F.2d 345 (4th Cir. 1991) (individualized inquiry was necessary to determine qualifications for teaching job); *Cook v. State of Rhode Island,* 10 F.3d 17, (1st Cir. 1993) (individualized inquiry into the plaintiff's physical abilities required).

(3d Cir. 1983), is the leading case concerning driving safety and disability employment discrimination.[26] In *Strathie*, the Third Circuit heard a challenge to a Pennsylvania state Department of Transportation rule which excluded people with hearing impairments from jobs as school bus drivers. The Third Circuit held that Section 504 mandated that the district court consider whether the plaintiffs would be able to drive safely if they were provided with reasonable accommodations such as a periodic inspection of hearing aids to ensure proper functioning. With regard to each possible accommodation, the court required a fact-specific inquiry into the safety risks that would be posed. This is precisely the type of individualized inquiry that the Supreme Court later commanded in *Arline, supra.*

The Ninth Circuit has consistently ruled that courts must conduct an individualized inquiry into the specific risks posed by a particular employee, including employees with diabetes. In *Bentivegna v. U.S. Department of Labor,* 694 F.2d 619, 621 (9th Cir. 1982), the Ninth Circuit struck down a blanket rule barring all applicants with diabetes mellitus that was not in "control," meaning blood sugar levels below a certain level.[27] The Ninth Circuit, relying on this Court's decision in *Southeastern Community College v. Davis,* 442 U.S. 397, 406 (1979), concluded that the City could not "discriminate by establishing restrictive 'program requirements' where it could not so discriminate in making individual employment decisions."[28] Therefore, "[b]lanket requirements must . . . be subject to the same rigorous scrutiny as any individual decision denying employment to a handicapped person."[29] The Court underscored that "[t]he importance of

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[26] Citing *Strathie*, this Court in *Arline* stated that the approach taken to assess the risks posed by an individual with a contagious disease was "consistent with that taken by courts that have addressed the question whether the Act covers persons suffering from conditions other than contagious diseases that render them a threat to the safety of others." *Arline*, 480 U.S. at 285.

[27] In *Chandler*, even those whose diabetes was "controlled" were excluded from a broad range of jobs.

[28] *Bentivegna*, 694 F.2d at 621.

[29] *Id.*

preserving job opportunities for the handicapped sets a high standard for the effectiveness of job qualifications that adversely affect the handicapped."[30] The Court required the City to demonstrate that its qualification standards were "directly connected with" and "substantially promote" safe performance.[31]

In this case, the City of Dallas cannot demonstrate that it relied on "reasoned and medically sound judgments" or that the physical criteria were "job-related" or "directly connected with" safe performance.[32] The City made no attempt to fashion a rule which would address its safety concerns. Rather, the City of Dallas merely imposed a U.S. Department of Transportation rule which was designed for a different purpose,[33] *interstate* driving of *commercial vehicles*.[34] In this case, the petitioners were driving non-

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[30] *Id.*

[31] *Id.* at 622; *see also, Chalk v. U.S. District Court for the Central District of California*, 840 F.2d 701, 705 (9th Cir. 1988) (a teacher with AIDS cannot be barred from teaching without an individualized inquiry into the safety risks posed); *see Doe v. Attorney General of the United States*, 941 F.2d 780, 798 (9th Cir. 1991) (individualized inquiry necessary to determine whether employee with AIDs would pose substantial risk); *Mantolete v. Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985) ("[a]n employer must gather all relevant information regarding the applicant s work history and medical history, and independently assess both the probability and severity of potential injury. This involves, of course, a case-by-case analysis of the applicant and the particular job.")

[32] Petitioners' Appendix B, p. 30a-31a. The job-related standard in Section 504 is modelled after and consistent with other civil rights statutes. *See* 45 C.F.R. 84.13 App. A, p. 383 (1993) (citing *Griggs v. Duke Power Company*, 401 U.S. 424 (1971); 29 C.F.R. § 32.14 (1993)).

[33] Moreover, the Department of Transportation has admitted that the DOT rule itself is medically unsubstantiated even for the purpose for which it was designed, and has instituted waiver programs from both the vision and diabetes standard. *See* discussion, *infra*.

[34] A commercial motor vehicle is "any self-propelled or towed vehicle used on the public highways in interstate commerce to transport passengers or property that exceeds 10,000 pounds, is designed to carry 15 or more passengers, or transports hazardous materials in quantities subject to placarding." 49 U.S.C. App. § 2503; 49 C.F.R. § 390.5.

commercial vehicles within the City of Dallas. Congress expressly deferred to state automobile licensing for the types of vehicles operated by petitioners.[35] This Court has warned against such wholesale reliance on a federal standard to defend a discrimination claim by city employees.[36]

In its review of the Department of Transportation regulations, the Fifth Circuit completely ignored the fact that the Department itself has recognized the importance of establishing waiver programs which determine qualifications based on individualized assessments even for drivers who *are* driving commercial vehicles. DOT has expressly stated that these waivers are necessary in order "to provide maximum employment opportunities for those persons covered by the Americans with Disabilities Act and the Rehabilitation Act of 1973."[37] Moreover, in instituting the waiver programs, DOT admitted that there is a "lack of empirical evidence on which to base clearly defensible . . . standards."[38]

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[35] The relevant Senate Report states:

> The 10,000-pound limit, which is in the current BCS regulations, is proposed to *focus* enforcement efforts and *because small vans and pickup trucks are more analogous to automobiles than to medium and heavy commercial vehicles, and can best be regulated under State automobile licensing, inspection, and traffic surveillance procedures.*
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> S. Rep. No. 424, 98th Congress (1984)

Moreover, even if petitioners *were* driving commercial vehicles, they would still be eligible to drive within the city because the statute explicitly allows for licensing in such circumstances 49 App. U.S.C.A. § 2505(h). Both petitioners had valid drivers licenses from the State of Texas.

[36] *Johnson v. Mayor & Council of Baltimore*, 472 U.S. 353 (1985) (adoption of federal mandatory retirement age for the city's firefighters is not a defense to claim of discrimination, as a matter of law).

[37] 57 Fed. Reg. 10295 (March 25, 1992) (vision waiver); *See also*, 58 Fed. Reg. 40693 (July 29th, 1993) (diabetes waiver).

[38] 57 Fed. Reg. 10295; See also, 58 Fed. Reg. 40690. These statements contradict the Fifth Circuit's reliance on an earlier statement in 1970 by the Director of the FHWA that the risks are "so well known." *Chandler*, 3 F.2d at 1394-5. Furthermore, as pointed out by the Eighth Circuit in *Woods v. Omaha School District*, 985 F.2d 437 (8th Cir.

Hence, while it is questionable whether the DOT rule could be used for the purposes for which it was designed, it certainly cannot meet the standards established by this Court and other Circuits to justify a rule which excludes all individuals with petitioner's disabilities from driving as a part of their city jobs. At a minimum, Section 504 requires individual assessments of risks, based on the medical, work and driving records of the individuals with the excluded impairments.

III. THE FIFTH CIRCUIT'S CATEGORICAL DENIAL OF CLASS TREATMENT IN SECTION 504 CASES IS INCONSISTENT WITH THE REHABILITATION ACT AND DECISIONS OF THIS COURT.

Creating another Catch-22, the Fifth Circuit allowed the City to exclude classes of individuals from jobs based on disability status, and at the same time refused to allow a class challenge to this practice. By stripping those individuals affected by the blanket exclusions of class relief, the Fifth Circuit departs from established class action principles and practices, the federal agency's Section 504 regulations and Congress' intent that Section 504 claimants have the same remedies as other civil rights plaintiffs.

Despite this Court's admonition that courts should subject class allegations to "rigorous analysis,"[39] the Fifth Circuit in two paragraphs held that class treatment was inappropriate in a Section 504 case because "the determinations of whether an

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1993), a case cited by the Fifth Circuit, as early as 1990, DOT had recognized that a "case-by-case assessments of insulin-using individual's abilities to safely operate nonpassenger-carrying commercial vehicles in interstate commerce is possible." 55 Fed. Reg. 4102 (1990).

Moreover, far from being the per se safety risks assumed by the Fifth Circuit, based on preliminary data recently made available as a result of the DOT Vision Waiver program, it appears that those low vision drivers who but for the waiver would not be allowed to drive interstate commercial vehicles under current DOT standards, are safer drivers than their non-vision impaired counterparts. *See, Federal Highway Administration, Monitoring Drivers of Commercial Motor Vehicles Who Receive Vision Waivers,* December 9, 1993.

[39] *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982).

individual is 'handicapped' or 'otherwise qualified' are necessarily individualized inquiries."[40]

The Fifth Circuit ignored the fact that all civil rights class actions require issues of proof regarding class membership and qualifications.[41] As the district court recognized, this case is appropriate for class relief because "[t]he party has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23 (b)(2).[42]

Nothing in the Rehabilitation Act or its basic implementing regulations suggests that class treatment is unavailable in Section 504 cases. To the contrary, both the statute and the regulations make it clear that Congress intended Section 504 claimants to have the same remedies as others alleging violations of their civil rights.

As this Court has explained, the 1978 amendments to the Act incorporated the "remedies, procedures and rights" set forth in Title VI of the Civil Rights Act of 1964.[43] Class actions have long been a staple of Title VI.[44] Likewise, this Court and all other

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[40] *Chandler*, 3 F.2d at 1396.

[41] *See* discussion, *infra*.

[42] Petitioners' Appendix B, p. 55a-56a. Rule 23 does not require that all issues be common or identical to the class — instead it requires that "questions of law or fact" be common to the class. Fed. R. Civ. P. 23(a).

[43] *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 625 (1984), *citing* 29 U.S.C. 794a(a)(2). *See also, School Board of Nassau County v. Arline*, 480 U.S. 273, 278 n.2 (1986) (noting "Congress' decision to pattern § 504 after Title VI").

[44] *See, e.g., Evans v. Jeff D.*, 475 U.S. 717 (1982); *Guardians Ass'n v. Civil Service Com'n of City of New York*, 463 U.S. 582 (1983); *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Jefferson v. Hackney*, 406 U.S. 535 (1972).

Circuits have accepted class challenges under a wide myriad of Section 504 cases.[45]

Moreover, the Rehabilitation Act regulations, which this Court has endorsed as "an important source of guidance on the meaning of Section 504,"[46] specifically contemplate class action lawsuits, based on civil rights law precedents. The regulations concerning employment criteria, like those in this case, explicitly adopt class action analysis. Thus, the regulations prohibit the use of any "employment test or other selection criterion that screens out or tends to screen out handicapped persons *or any class of handicapped persons* unless . . ." the test is shown to be job related and alternative job related tests without such an effect are not available.[47]

This action was certified solely under Federal Rule of Civil Procedure 23(b)(2) and solely for purposes of injunctive relief. The remedy ordered was injunctive relief requiring the City to make individual determinations regarding the ability of class members to perform the jobs in question, rather than relying solely on its sweeping employment standards.[48] Under this approach, the District Court was not required to make any individual determinations concerning class members. Indeed, the nature

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[45] *See, e.g., Alexander v. Choate*, 469 U.S. 287 (1985); *Strathie v. Department of Transportation, supra; New York State Assn. for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979); *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982); *New Mexico Association of Retarded Citizens v. State of New Mexico*, 678 F.2d 847 (10th Cir. 1982); *Yaris v. Special School District of St. Louis County*, 780 F.2d 724 (8th Cir 1986). *See also, Roncker v. Walter*, 700 F.2d 1058, 1063-1064 (6th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983) (Education for All Handicapped Children Act's requirement of individualized placement decisions does not preclude class treatment).

[46] *Arline*, 480 U.S. at 279.

[47] 45 C.F.R. 84.13(a) (1992) (emphasis added). As explained in the Section by Section Analysis to the regulations, "[t]his paragraph is an application of the principle established under Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971)." 45 C.F.R. § 84.13 App. A, 383 (1992). *Griggs* was a class action which established the disparate impact theory of discrimination.

[48] *See, Chandler v. Dallas*, 958 F.2d 85, 87 (5th Cir 1992).

of the wrong was that the City adopted a policy that explicitly precluded the individual determinations required by Section 504.

The irony of the Fifth Circuit's holding is that it protects an employer from class actions particularly when it acts on a class basis. The common issues in this case are more central than those in other types of class cases where many individual issues could be involved, such as damage actions or fraud cases. Indeed, even absent a specific employment test or standard, this Court has held that where an employer has used a "biased testing procedure" or there was "significant proof" that an employer acted under a "general policy" of discrimination, common questions justified class certification even with a broad class of applicants and employees. The subclasses certified in this case are much narrower, and share more common issues than those endorsed by *Falcon*.[49]

In *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983), an analogous case under the Education for All Handicapped Children Act of 1975, 20 U.S.C. 1401 *et seq.*, the Sixth Circuit has upheld class treatment despite that Act's requirement of individual placement determinations. In *Roncker*, as in this case, plaintiffs challenged a blanket policy which precluded individual determinations. "Such an allegation, if proven, would show a violation of the Act for the very reason that placements were not individually made."[50]

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[49] *Falcon*, 475 U.S. 147, n.15. Even if this action had presented individual issues, it is well established that the presence of individual issues is not fatal to class treatment. Thus, even where each class member must individually prove damages — a situation far more individualized than that below — it is clear that class treatment is appropriate. *See* Advisory Committee Notes to 1966 Amendments to Rule 23, 39 F.R.D. 69, 103. Indeed, in most civil rights class actions, individualized determinations of class status and entitlement to damages are the norm, not the exception. *See, e.g., Cooper v. Federal Reserve Bank*, 467 U.S. 867, 876 (1984); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361 (1977).

[50] *Roncker*, 700 F.2d at 1064. *Accord, Andre H. v. Ambach*, 104 F.R.D. 606 (SDNY 1985).

Instead of reviewing the trial court's certification order under the abuse of discretion standard,[51] the Fifth Circuit adopted a radical and draconian rule which would deny plaintiffs with disabilities and the courts the benefits of class treatment afforded to all other protected classes. Instead of allowing the most effective and efficient means of litigating common and systemic issues, the Fifth Circuit would require each person affected by Dallas' employment standards to mount entirely independent actions.[52] The burden to plaintiffs and the courts is clear. The City of Dallas, having determined to act on a class basis, would enjoy immunity from a class adjudication. Such a result would undermine the goal of the Rehabilitation Act and invite other categorical exemptions from Rule 23, thus ultimately vitiating Rule 23 itself.

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[51] *See, e.g., Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986).

[52] "Efficiency and economy of litigation" are the principal purposes of class action procedures. *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 553 (1974); *Falcon, supra*, at 159. Accordingly, the class device "was intended to establish a procedure for the adjudication of common questions of law or fact." *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 880 (1984). It is a medium for the "expeditious" determination of common questions. *Id.* at 881.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court grant the petition for writ of certiorari.

Respectfully submitted,

DISABILITY RIGHTS EDUCATION & DEFENSE FUND

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